No. 08-765

Supreme Court, U.S.
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# In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

*Petitioner,*

v.

JEREMY JAYNES,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF OF THE PETITIONER

In his Brief in Opposition, Jaynes acknowledges that (1) he violated the Virginia Act; (2) the Virginia Act is constitutional as applied to him; and (3) the Virginia Act is constitutional in all but a "small percentage" of its applications. *Br. in Opp.* at 1, 21. This Court has repeatedly held that a First Amendment facial challenge must fail in those circumstances. As recently as last Term, the Court rejected a facial challenge to a statute because "[i]n the vast majority of its applications, th[e] statute raises no constitutional problems whatever." *United States v. Williams*, 128 S. Ct. 1830, 1844 (2008). The Virginia Supreme Court's decision cannot be reconciled with *Williams* or the many other cases requiring that courts assess a statute's "overbreadth . . . in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

In its Petition, Virginia pointed to a conflict in approaches used by the lower courts in determining whether a statute is "substantially" overbroad. The Supreme Court of Virginia's approach is diametrically opposed to the approach utilized by the First, Third, Tenth, and, most recently, Sixth Circuits. Given the "substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct," *Virginia v. Hicks*, 539 U.S. 113, 119 (2003), it is vitally important

that the test for determining substantial overbreadth reflect the principles of judicial restraint.

Jaynes does not respond meaningfully to these fundamental points. Instead, he attempts to sow confusion by asserting that Virginia never raised the issue of substantial overbreadth in the lower courts. *Br. in Opp.* 5-7. He insists that there is no real conflict among the lower courts as to how to determine substantial overbreadth. *Br. in Opp.* 7-13. Most remarkably, although he acknowledges that constitutionally "protected e-mails likely will be only a small percentage of e-mails" covered by the Virginia Act, *Br. in Opp.* 21, Jaynes insists that the Virginia Act is substantially overbroad. *Br. in Opp.* 15-23. Jaynes is simply wrong on all three contentions.

## I. VIRGINIA ARGUED BELOW THE ISSUE OF SUBSTANTIAL OVERBREADTH AND THE NEED FOR A COMPARATIVE ANALYSIS.

Although Virginia defended the statute on a number of grounds, Virginia expressly argued that there was no substantial overbreadth because the act was constitutional in most circumstances. Brief of Virginia at 34-35, *Jaynes v. Virginia*, 657 S.E.2d 478 (Va. 2008). Virginia argued that:

> The Act is not substantially overbroad. *Most applications of the Act are clearly constitutional.* For example, it is constitutional to apply the Act to unsolicited bulk commercial e-mail.

> Similarly, it is constitutional to apply the Act to unsolicited bulk e-mail that proposes a criminal transaction, that is defamatory, or that contains obscene images. *These legitimate applications—commercial, criminal, defamatory, and obscene—are greater than any unconstitutional applications of the Act.*

*Id.* at 34 (emphasis added). *See also* Brief of Virginia at 36, *Jaynes v. Virginia,* 634 S.E.2d 357 (Va. Ct. App. 2006) (similar argument in the state intermediate appellate court). In a supplemental letter advising the lower court of this Court's decision in *Williams*, Virginia reiterated the need to compare constitutional applications with unconstitutional applications:

> The second step in the overbreadth analysis asks "whether the statute, as we have construed it, criminalizes a substantial amount of protected expressive activity." In making such an evaluation, *this Court must recognize that non-commercial unsolicited bulk e-mails that offer or seek to obtain unlawful materials are not constitutionally protected.* Moreover . . . *the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient" to justify facial invalidation.*

Supplemental Authority Letter of May 19, 2008 at 1, *Virginia v. Jaynes*, 666 S.E.2d 303 (Va. 2008) (emphasis added, citations omitted).

Not only did Virginia raise the issue, but the lower court acknowledged the argument. The Supreme Court of Virginia observed that:

> [t]he Commonwealth argues that Code § 18.2-152.3:1 is not substantially overbroad because . . . 'most' applications of its provisions would be constitutional, citing its application to unsolicited bulk commercial e-mail, unsolicited bulk e-mail that proposes a commercial transaction, and unsolicited bulk e-mail that is defamatory or contains obscene messages.

*App.* 26.

In sum, Virginia pressed the substantial overbreadth issue below—including the need to compare constitutional applications to unconstitutional applications. Jaynes' argument to the contrary is devoid of merit.

## II. THE VIRGINIA SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS ON SUBSTANTIAL OVERBREADTH.

Jaynes expressly acknowledges that constitutionally "protected e-mails likely will be only a small percentage of e-mails affected" by the Virginia Act. *Br. in Opp.* 21.[1] This point goes to the heart of the

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[1] Consistent with Jaynes' own assessment, the internet service providers note that e-mail spam, *i.e.*, e-mail containing

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error committed below. *See Connection Distributing Co. v. Holder*, ___ F.3d ___, ___, 2009 WL 414615 at *16 (6th Cir. 2009) (*en banc*). As this Court explained last Term, if "the vast majority of its applications" raise "no constitutional problems whatever," the statute cannot be substantially overbroad. *Williams*, 128 S. Ct. at 1844.

Jaynes contends that so long as a statute applies to e-mails that are "worthy of First Amendment protection," such as someone who forged or falsified transmission information to disseminate the Federalist Papers via e-mail, the statute is facially unconstitutional. *Br. in Opp.* 21. The lower court shared this misunderstanding of the overbreadth doctrine. This view effectively eviscerates the substantial overbreadth requirement. The "'substantial overbreadth' requirement prohibits a party from leveraging a few alleged unconstitutional applications of the statute into a ruling invalidating the law in all of its applications." *Connection*, ___ F.3d at ___, 2009 WL 414615 at *16. It prevents the invalidation of a statute "where, despite some possibility of impermissible application, the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.'" *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964-65 (1984) (citation omitted).

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fraudulent or forged transmission information, is overwhelmingly commercial and is rarely used to convey political or religious speech. *USISPA Amicus Br.* 14-16.

Since "invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects." *Williams,* 128 S. Ct. at 1838, the substantial overbreadth requirement limits facial invalidity to those situations where "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 801 (1984).

Of course, the litigants may still raise an as-applied challenge to the Virginia Act. *Wisconsin Right to Life, Inc. v. FEC,* 546 U.S. 410, 412 (2006) (per curiam). Such challenges "are the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007). Moreover, a defendant may pursue a pre-enforcement *as-applied* challenge. *Id.* at 1638-39.

Jaynes also argues that speech regulations that extend beyond commercial speech may be found to be overly broad "for that reason alone." *Br. in Opp.* 20. Neither case he cites supports this proposition. In *Reno v. ACLU*, 521 U.S. 844 (1997), this Court invalidated the Communications Decency Act because it infringed on a "large amount" of constitutionally protected speech—in marked contrast to the present statute. *Id.* at 874. In *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150 (2002), the Court invalidated an ordinance requiring registration for door-to-door advocacy, holding that the "breadth of

the speech [adversely] affected by the ordinance," combined with a lack of narrow tailoring, were fatal. *Id.* at 164, 168. Far from undermining Virginia's position, these cases support it.[2]

Jaynes contends that Virginia could solve any overbreadth problem by enacting a statute limited to commercial e-mail spam. *Br. in Opp.* 22. This argument ignores the cardinal principle that courts should not "short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008). This Court's overbreadth doctrine does not permit courts to strike down statutes that are constitutional in the vast majority of their applications merely because the legislature could draft a better statute.

Contrary to Jaynes' argument, the statute does not threaten anonymous speech on the internet. *Br. in Opp.* at 23. The statute prohibits the "falsification or forg[ery]" of "transmission information or other routing information." Virginia Code § 18.2-152.3:1(A). There is no constitutional right to falsify one's identity in order to circumvent security measures so

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[2] Virginia does not ask for a "bright line" or a "numerical cut off" as Jaynes suggests. *Br. in Opp.* 8 n.6. Rather, Virginia seeks nothing more than to ensure that courts actually undertake a correct assessment of substantial overbreadth.

as to send speech that is unwelcome by the recipients. By analogy, even if someone wishes to deliver political pamphlets, there is no right to print a falsified *delivery slip that causes UPS to deliver the package* at UPS's expense to an unwilling recipient. Moreover, there are many ways besides to communicate anonymously on the internet without falsifying transmission information.

There was no need for the draconian remedy of facial invalidation. Indeed, courts should "try not to nullify more of a legislature's work than is necessary, [because] '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006). Virginia's anti-spam statute was the product of a *unanimous* vote by both houses of the Virginia General Assembly.[3] It should not have been invalidated entirely without some assessment of its permissible reach relative to its unconstitutional applications.

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[3] *See* http://leg1.state.va.us/cgi-bin/legp504.exe?031+sum+HB2290. This year, the General Assembly considered and rejected a bill, House Bill 1796, that would have created an *additional* anti-spam statute limited to commercial spam. http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb1796.

## III. THE CONFLICT AMONG THE LOWER COURTS IS REAL AND HAS DEEPENED SINCE THE FILING OF THE PETITION.

Although Jaynes strains to diminish the conflict among the lower courts, the conflict is real and deep. Whether a statute is deemed substantially overbroad depends upon the approach that the court takes.

The Eighth Circuit, the Supreme Court of Virginia and other courts employ an absolutist approach, finding substantial overbreadth whenever a statute is not written "to prevent only that speech which the government has an interest in restricting." *Milavetz, Gallop & Milavetz, P.A. v. United States,* 541 F.3d 785, 794 (8th Cir. 2008), *pet. for rehearing en banc denied* (Dec. 5, 2008).[4] *See also Hawaii v. Beltran,* 172 P.3d 458, 464 (Haw. 2007).[5] *City of*

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[4] Jaynes incorrectly asserts that *Milavetz* was an as-applied challenge. *Br. in Opp.* 10. The plaintiff in *Milavetz* was making a facial challenge alleging overbreadth. *See Milavetz*, 541 F.3d at 798-99 (Colloton, J., dissenting) (describing the challenge as a facial challenge alleging overbreadth). *See also* United States Petition for Rehearing *En Banc* at 1, *Milavetz,* 541 F.3d 785 (characterizing the Eighth Circuit decision as invalidating "an Act of Congress as facially invalid under the First Amendment."). Since the filing of the Petition, the Fifth Circuit has rejected an overbreadth challenge to the same federal law invalidated as overbroad in *Milavetz*. *See Hersh v. United States ex rel. Mukasey,* 553 F.3d 743, 762-63 (5th Cir. 2008).

[5] Jaynes' erroneously contends that *Beltran* was decided under the Hawaii constitution, *Br. in Opp.* 10. In *Beltran*, the plaintiff alleged that an ordinance and a regulation that governed camping was substantially overbroad in violation of the United States and the state constitution. 172 P.3d at 461-64.

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*Maquoketa v. Russell,* 484 N.W.2d 179, 185-86 (Iowa 1992). Under this approach, a statute—like the Virginia Act—that may be constitutionally problematic in a "few hypothetical situations" is invalidated in all applications. *See Milavetz*, 541 F.3d at 799 (Colloton, J., dissenting).

In contrast, the First, Third, Sixth, and Tenth Circuits use a comparative approach, focusing on "a rough balancing of the number of valid applications compared to the number of potentially invalid applications." *Magill v. Lynch*, 560 F.2d 22, 30 (1st Cir. 1977). *See also Borden v. Sch. Dist. of Tp. of East Brunswick*, 523 F.3d 153, 165 (3rd Cir. 2008), *cert. denied*, No. 08-482 (March 2, 2008); *Gibson v. Mayor & Council of Wilmington,* 355 F.3d 215, 226 (3rd Cir. 2004).[6] If "the number of [unconstitutional]

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The Hawaii Supreme Court noted in passing that certain cases relied upon by the municipality were distinguishable, and moreover, it was "not bound by the decisions of other courts insofar as greater protection *may be* afforded" by the constitution of Hawaii. *Id.* at 470. The Court ultimately held that the ordinance and the statute were unconstitutional, without limiting its holding to the state constitution. *Id.*

[6] Jaynes notes that two recent opinions of the Third Circuit do not expressly rely on the analytical factors listed in *Gibson* and *Borden*. *Br. in Opp.* 12-13. However, the Third Circuit has not abandoned those factors. Furthermore, the court examined, albeit briefly, the impermissible scope of each measure. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 316, 319 (3rd Cir. 2008) (University's policy against sexual harassment held substantially overbroad because it covered "too much expression that is constitutionally protected."); *ACLU v. Mukasey*, 534 F.3d 181, 207 (3rd Cir. 2008), *cert. denied*, 129

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applications is insubstantial compared to the number of [constitutional] applications," *ACORN v. City of Tulsa*, 835 F.2d 735, 744 (10th Cir. 1987), then there is no substantial overbreadth. *See also Nat'l Advertising Co. v. City and County of Denver*, 912 F.2d 405, 411 (10th Cir. 1990). Under this approach, a statute—like the Virginia Act—that is constitutional in the vast majority of circumstances will survive an overbreadth challenge.

This conflict has deepened since the filing of the Petition. On February 20, 2009, the Sixth Circuit—sitting *en banc*—adopted the comparative approach. *See Connection*, ___ F.3d at ___, 2009 WL 414615 at *12-18. In declining to hold that a federal pornography statute was substantially overbroad, that court observed that "there is little basis for dispute that [the federal statute] complies with the First Amendment in most settings" and that the "'legitimate sweep' of the law represents the vast majority of its applications." *Id.* at ___, 2009 WL 414615 at *13. As the court stressed, "[t]he question is not whether the claimant can imagine some 'overbreadth;' it is whether the claimant can show 'substantial overbreadth.'" *Id.* at ___, 2009 WL 414615 at *14 (emphasis added).

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S. Ct. 1032 (2009) (Child Online Protection Act was overbroad because it reached a "large amount" of protected speech).

## CONCLUSION

For the reasons stated above, in the Petition itself, and in the various amici briefs supporting Virginia, the Petition for a Writ of Certiorari should be GRANTED.

Respectfully submitted,

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